

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
	:	
of	:	
EMPLOYMENT SCREENING SERVICES, LLC	:	DETERMINATION
	:	DTA NO. 829702
	:	
for an Award of Costs Pursuant to Tax Law § 3030 for the Period March 1, 2015 through February 28, 2018.	:	
	:	

Petitioner, Employment Screening Services, LLC, filed an application seeking administrative costs pursuant to Tax Law § 3030. The Division of Taxation, appearing by Amanda Hiller, Esq. (Michael Hall), filed a response to the application for costs on March 3, 2023. The 90-day period for issuance of this determination began on March 6, 2023.

Based upon petitioner's application for costs, the Division of Taxation's response to the application, and all pleadings and proceedings had herein, Alejandro G. Taylor, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner is entitled to an award of costs pursuant to Tax Law § 3030.

FINDINGS OF FACT

1. Petitioner, Employment Screening Services, LLC, is a limited liability company that operates an employment screening business located in Amherst, New York. Petitioner has been operating since the mid-1990's. Petitioner was solely owned by Robert Wright until about 2010, when his wife, Rosario, became a co-owner. Mr. Wright died in 2020. Mrs. Wright is presently petitioner's sole-owner.

2. Petitioner provides screening services for its clients including verification services and drug screening services.¹ Petitioner verifies a customer's prospective employee's social security number, name, including any additional names used, address, criminal record, and education. If requested by a customer, petitioner will check references provided by the potential employee. Petitioner does not undertake any investigation other than verifying information provided by a customer's potential employee and only does so with the potential employee's written permission.

3. Petitioner's list of services provided to its clients or potential clients is set forth in its entirety as follows:

"Social Security Number Verification / Trace

Verify the information an applicant has written on their application. You will know if they have failed to list a last known address, if they have used other names or social security numbers. This is an excellent way to uncover information an applicant may be attempting to keep concealed. Many criminal records are discovered in counties that an applicant has failed to inform you about. *(This is not a stand alone service)*

Criminal Records Check by County

Uncover an applicant's criminal record, including Misdemeanors and Felonies for the past seven years. The criminal records are extracted directly from the County Courthouse, which is essential to obtain the most accurate and timely information available.

Federal Criminal Records Search

This allows your organization to verify if an applicant has ever had a Federal criminal conviction. Examples of such crimes are securities and tax law violations, immigration, weapons, interstate drug crimes and civil rights violations.

National Criminal Database Search

The National Criminal Database searches Criminal Convictions, Sex Offender Registry, Department of Corrections, and Arrest records throughout the United States. We strongly recommend you use the National Criminal Database Search as a supplement to the Criminal Records check by County listed above. *(This is not a stand alone service)*

¹ Petitioner's drug screening services were not at issue in this case.

Drug Screening

Choose from 5 to 10-panel drug screens customizable to fit your specific needs. Our partners are leaders in the industry and have over 10,000 collection facilities nationwide. Results in just 24 hours.

Registered Sex Offender Search

This allows you [sic] organization to verify whether an individual is a registered sex offender.

Department of Motor Vehicles Drivers License History

Have an in-depth look at the applicant's driving habits for the past three years. You will be able to determine if the applicant has any points on their license, whether they have had an accident or their license has been suspended. You will also be able to determine if the applicant has attended any driver safety courses [sic]

National Canadian Criminal Record Search

This search made against the National Repository record for Criminal Records in Canada which is maintained by the Royal Canadian Mounted Police and contains criminal records for all of Canada.

Education Verification

Find out if your applicant is truly qualified. Verifies Start Date, End Date, Major, GPA and Degree.

Employment Verification

Verify an applicant's employment history including Salary, Start Date, End Date and Position.

Reference Verification

Let Employment Screening Services ask a series of questions which will give your company insight into how personal and/or professional acquaintances feel about the applicant's character.

Professional License Verification

Determine whether an applicant has the licensure they claim on their resume and application.

Office of the Inspector General (OIG)

General Services Administration (GSA)

These two searches are essential for health care providers. OIG & GSA searches determine whether an individual is excluded from participating in Federal Procurement and Non-procurement Programs such as Medicare and Medicaid.

E-Med NY

Office of the Medicaid Inspector General. Search for Restricted, Terminated or Excluded Individuals or Entities.

E-Verify (Conducted Post Employment)

An Internet-based system that allows an employer, using information reported on an employee's Form 1-9, Employment Eligibility Verification, to determine the eligibility of that employee to work in the United States.

Bankruptcy Search

A direct search of the U.S. Bankruptcy Court system to determine if an individual or commercial entity has sought protection under federal bankruptcy laws."

4. As is evident from the list of services set forth above, petitioner accesses various databases to verify background information provided by a client's prospective employee when applying for a job. Databases that petitioner searches include, but are not limited to, those maintained by the New York State courts system, the New York State Department of Corrections, the National Criminal and Sex Offender Database, and the New York State Department of Motor Vehicles.

5. The record does not disclose how petitioner verifies an employment applicant's social security number, address history, or employment history.

6. To verify an applicant's education history, petitioner contacts the educational institution listed by the applicant and provides a copy of the consent allowing that information to be released.

7. When a potential client of petitioner is deciding whether to engage petitioner, petitioner and the potential client sit down and do a needs-based analysis to determine which services petitioner recommends based upon the client's needs. Thereafter, petitioner provides a quote.

8. Petitioner's marketing materials describe the services it performs as a way for customers to "minimiz[e] their risks of hiring mistakes and liabilities." Petitioner's website states that its reports are both "thorough and informative" and used as a way to "avoid costly litigation and enhance productivity. Hire with confidence."

9. Petitioner carries professional liability insurance to protect its clients and assures potential clients that if they use its services, they can be sure that they are "hiring honest reliable people."

10. Petitioner's client services agreement requires the client to agree that "it shall use consumer report for employment purposes only for a one-time use, and to hold the report in strict confidence, not to disclose it to any third parties not involved in the current employment decision."

11. If hired by the client, petitioner verifies information for a client, it provides a summary report through an online portal that indicates whether the client's applicant's information has been verified or whether it is unverified. The final report may also include information obtained by permission that is simply copied onto petitioner's letterhead. In the sample report entered into evidence, the fictitious applicant's name, alternate names used, date of birth, and social security number are listed as well as the results of optional searches including the applicant's criminal convictions, drug test and medical exam results and driver's license record.

12. Petitioner maintains a database of all the information that it collects. If two different clients request verification of the same applicant, petitioner will perform two separate searches. Petitioner does not use the data that it verifies for a particular client in any other way; nor is the data that it verifies for one client ever shared with another party.

13. Petitioner has never provided: (i) alarm services; (ii) services of systems that provide protection against burglary, theft, fire, or water damage; (iii) armored car services; (iv) guard, patrol or watchman services; (v) services or systems that provide protection against malfunction of industrial processes or (vi) services or systems that provide or protect against malfunction of, or damage to, property or persons.

14. Petitioner does not employ any licensed private investigators or licensed detectives, nor does it characterize itself as a detective agency.

15. In or about May 2018, the Division of Taxation (Division) initiated a sales and use tax audit of petitioner for the period March 1, 2015 through February 28, 2018 (audit period). Petitioner did not file sales tax returns during the audit period nor was it a registered vendor for sales tax purposes.

16. Petitioner consented to a test period audit of its sales and recurring expense purchases for the audit period by its execution of a test period audit election method form.

17. A review of sales records determined taxable sales of \$1,799,591.31, with sales tax due of \$139,489.93. Tax was asserted based upon the determination that petitioner's employment verification services were detective or protective services pursuant to Tax Law § 1105 (c) (8).² Expense purchases were also reviewed resulting in additional tax due of \$349.11.

18. On December 5, 2018, the Division issued a notice of determination, notice number L-049220535 (notice) to petitioner asserting sales and use tax in the amount of \$139,839.04 plus interest and penalties.

² In its answer to the petition, the Division alleged that petitioner's services constituted information services subject to tax under Tax Law § 1105 (c) (1) and (9).

19. At the hearing in this matter, petitioner submitted copies of invoices from its competitors as well as businesses that petitioner hired to perform searches on its behalf. Petitioner's competitors did not charge sales tax to its customers for its services nor did the entities petitioner contracted with charge petitioner sales tax. Petitioner did not give resale certificates to the entities it hired to perform searches on its behalf because it was petitioner's understanding was that such service was not taxable.

20. Petitioner's longtime accountant, bookkeeper and office manager, Sarah Gruszka, testified at the hearing in this matter. Ms. Gruszka has been employed by petitioner since January 2010. Ms. Gruszka testified that, when she began employment with petitioner, she inquired with Mr. Wright about sales tax. Mr. Wright informed her that he was told by the Division that petitioner's services were not subject to sales tax. Ms. Gruszka also stated that she did her own research and concluded that petitioner's services were not subject to sales tax.

21. Following the hearing in this matter, the Division of Tax Appeals issued a determination, dated October 6, 2022, finding that petitioner's services did not constitute "protective services" within the meaning that term has been accorded under relevant caselaw. The Administrative Law Judge also determined that while petitioner's services constitute information services (~~see~~ Tax Law §§ 1105 [c] [1], [9]), such services were customized based on a specific applicant and thus were individual and personal in nature and accordingly, were excluded from sales tax. The Administrative Law Judge canceled that portion of the notice of determination asserting tax on petitioner's verification services and directed the Division to modify the notice of determination accordingly.

22. Following the issuance, the Division requested two extensions of time to file an exception to the determination with the Tax Appeals Tribunal (Tribunal). The Tribunal granted

both requests, ultimately extending the time to file an exception to January 5, 2023. By correspondence dated January 9, 2023, the Division informed petitioner and the Tribunal that no exception had been taken.

23. On February 6, 2023, petitioner filed an application for costs pursuant to Tax Law § 3030. Attached to petitioner's representative's affirmation in support of petitioner's costs award application is an exhibit setting forth an itemized statement of services that petitioner's representatives provided in preparing for litigation of this matter, including date of service, activity category, description of the service rendered, the number of hours spent in one-quarter hour increments, and the representative who performed the service. Petitioner's representatives reported 118.25 hours of services for petitioner at \$75.00 per hour, together with \$606.78 in expenses, for a total of \$9,475.53. Petitioner did not include a statement of its number of employees or its net worth at the time of filing of the petition in this matter.

CONCLUSIONS OF LAW

A. Tax Law § 3030 (a) provides, generally, as follows:

“In any administrative or court proceeding which is brought by or against the commissioner in connection with the determination, collection, or refund of any tax, the prevailing party may be awarded a judgment or a settlement for:

- (1) reasonable administrative costs incurred in connection with such administrative proceeding within the department, and
- (2) reasonable litigation costs incurred in connection with such court proceeding.”

Reasonable administrative costs include reasonable fees paid in connection with the administrative proceeding, but incurred after the issuance of the notice or other document giving rise to the taxpayer's right to a hearing (*see* Tax Law § 3030 [c] [2] [B]). The statute provides that such fees, provided by a professional authorized to practice before the Division of Tax

Appeals, shall be capped at \$75.00 per hour, unless there are special factors that justify a higher amount (*see* Tax Law § 3030 [c] [1] [B] [iii]).

B. A prevailing party is defined by the statute, in part, as follows:

“[A]ny party in any proceeding to which subdivision (a) of this section applies (other than the commissioner or any creditor of the taxpayer involved):

(i) who (I) has substantially prevailed with respect to the amount in controversy, or (II) has substantially prevailed with respect to the most significant issue or set of issues presented, and

(ii) who (I) within thirty days of final judgment in the action, submits to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from an attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed . . . and (II) is an individual whose net worth did not exceed two million dollars at the time the civil action was filed, or is an owner of an unincorporated business, or any partnership, corporation, association, unit of local government or organization, the net worth of which did not exceed seven million dollars at the time the civil action was filed, and which had not more than five hundred employees at the time the civil action was filed . . .” (Tax Law § 3030 [c] [5] [A]).

C. Although a party may prevail with regard to the amount in controversy or the most significant issue or set of issues presented, there is an exception to finding that party to be the prevailing party for purposes of Tax Law § 3030 where the Division has demonstrated that its position in the proceeding was substantially justified (*see e.g. City of New York v State of New York*, 94 NY2d 577 [2000]). Tax Law § 3030 (c) (5) (B) - (C) provides, in relevant part:

“(B) Exception if the commissioner establishes that the commissioner's position was substantially justified.

(i) General rule. A party shall not be treated as the prevailing party in a proceeding to which subdivision (a) of this section applies if the commissioner establishes that the position of the commissioner in the proceeding was substantially justified.

(ii) Burden of proof. The commissioner shall have the burden of proof of establishing that the commissioner's position in a proceeding referred to in subdivision (a) of this section was substantially justified, in which event, a party shall not be treated as a prevailing party.

(iii) Presumption. For purposes of clause (i) of this subparagraph, the position of the commissioner shall be presumed not to be substantially justified if the department, inter alia, did not follow its applicable published guidance in the administrative proceeding. Such presumption may be rebutted.

(iv) Applicable published guidance. For purposes of clause (ii) of this subparagraph, the term “applicable published guidance” means (I) regulations, declaratory rulings, information releases, notices, announcements, and technical services bureau memoranda, and

(II) any of the following which are issued to the taxpayer: advisory opinions and opinions of counsel.

(C) Determination as to prevailing party. Any determination under this paragraph as to whether a party is a prevailing party shall be made by agreement of the parties or (i) in the case where the final determination with respect to tax is made at the administrative level, by the division of tax appeals, or (ii) in the case where such final determination is made by a court, the court.”

D. Tax Law § 3030 is modeled after Internal Revenue Code (IRC) (26 USC) § 7430 (*see* Governor’s Approval Memo, Bill Jacket, L 1997, ch 577, § 31). Thus, federal cases concerning IRC § 7430 should be looked to for guidance (*see Matter of Levin v Gallman*, 42 NY2d 32, 34 (1977); *Matter of Ilter Sener*, Tax Appeals Tribunal, May 6, 1988). Under federal caselaw, a position is substantially justified if it has a reasonable basis in both fact and law (*see Info. Resources v United States*, 996 F2d 780 [5th Cir. 1993]), with such determination properly based on all the facts and circumstances surrounding the case, not solely upon the final outcome (*Phillips v Commr.*, 851 F2d 1492, 1499 [DC Cir. 1988]; *Heasley v Commr.*, 967 F2d 116, 120 [5th Cir 1992]). This determination of whether the Division’s position is substantially justified is made in view of what the Division knew at the time the position was taken, i.e., when the notices were issued (Tax Law § 3030 [c] [8] [B]). The fact that the applicant for an award of costs ultimately prevailed in its protest is a factor to be considered, but does not preclude a finding that

the Division's position was substantially justified at the time the notice was issued (*Matter of March*, Tax Appeals Tribunal, November 26, 2018, quoting *Phillips v Commr*).

E. In addition to prevailing on the amount in controversy or the most significant issue presented in the proceeding, the applicant for an award of costs must demonstrate that it meets the other statutory requirements in order to qualify as a prevailing party. Specifically germane to the discussion here, the owner of an unincorporated business, partnership, or corporation must demonstrate that the business entity did not have a net worth of more than \$7,000,000.00 and not more than 500 employees at the time the civil action was filed in order to be found to be a prevailing party (*see* Tax Law § 3030 [c] [5] [A]). Because petitioner's application for an award of costs did not include any information about petitioner's net worth or number of employees, petitioner's application for a cost award must be denied (*see Matter of Stuckless*, Tax Appeals Tribunal, August 16, 2007 [holding that it is crucial that an applicant for a cost award make a complete statement of net worth relating back to the time the action was commenced]).

F. In light of the foregoing, it is unnecessary to determine whether the Division's position in this matter was substantially justified, as the applicant has failed to carry its burden of proof in demonstrating its net worth and number of employees and thus is precluded from being found to be the prevailing party in this matter.

G. The application of Employment Screening Services, LLC, for an award of costs pursuant to Tax Law § 3030, is denied.

DATED: Albany, New York
May 25, 2023

/s/ Alejandro G. Taylor
ADMINISTRATIVE LAW JUDGE